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277780—53

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 355

W. B. FOLLETT, PETITIONER

v.

HUGH A. VORIS, DEPUTY COMMISSIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas (R. 35) is reported at 104 F. Supp. 827. The opinion of the Court of Appeals for the Fifth Circuit (R. 47) is reported at 205 F. 2d 542.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1953 (R. 50). The petition for writ of certiorari was filed on September 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in the computation of compensation, under Section 8 (c) of the Longshoremen's and Harbor Workers' Compensation Act, for permanent partial loss of use of a member of the body, the deputy commissioner erred in multiplying the percentage of disability by the number of weeks for which compensation is payable for total loss of use of that member, and multiplying this product in turn by the maximum weekly payment allowed by the Act.

STATUTES INVOLVED

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. 901 *et seq.*, the New York Workmen's Compensation Law, 64 McKinney's Cons. Laws 1 *et seq.*, and the Texas Workmen's Compensation Law, Art. 8306 (12), Vernon's Revised Civil Statutes of Texas (1953 Supp.), are set forth in the Appendix, *infra* pp. 11–12.

STATEMENT

On December 27, 1949, petitioner, while in the employ of the Southern Stevedoring Co., Inc., as a longshoreman at Houston, Texas, was injured aboard the SS. *James McKay,* then afloat upon the navigable waters of the United States. Upon his claim for compensation under the Longshoremen's and Harbor Worker's Compensation Act, the petitioner, his employer and the insurance

carrier stipulated that the disability amounted to a 15 per cent partial permanent disability of his left hand. After investigation, the deputy commissioner found that the average earnings of the petitioner at the time of his injury were $103 per week; that from December 28, 1949, to March 7, 1950, he necessarily sustained a loss of $21 per week on account of partial disability resulting from his injuries, entitling him to compensation at $14 per week for ten weeks in the sum of $140; that he had been paid compensation in the sum of $173.20, an overpayment of $33.20; that as a result of the injury petitioner had a permanent partial disability equivalent to 15 per cent of such disability as he would have sustained had he lost his hand; and that for this disability he was entitled to 31.8 weeks' compensation at $35 per week, amounting to $1,113.[1] (R. 31–32.) An award was entered, accordingly, on April 3, 1951. (R. 33).

The deputy commissioner arrived at the $1,113 figure by allowing petitioner compensation at the rate of $35 per week, the maximum allowed by Section 6 (b) of the Act (Appendix, *infra*, p. 11),[2] for 31.8 weeks, which was 15 per cent of

[1] The deputy commissioner also found that the employer and insurance carrier were entitled to a credit for the $33.20 overpayment, leaving a balance of $1,079.80. (R. 33.)

[2] Section 8 (c) of the Act (Appendix, *infra*, p. 11), allows an award of 66⅔ percent of the average weekly wage of the claimant. Since the claimant's average weekly wage in this case was $103 per week, and since 66⅔ percent of that

the 212-week period during which petitioner would have collected compensation had he suffered a permanent total disability of his left hand. Alleging that this formula erroneously computed the compensation to which he was entitled as a matter of law, petitioner sought a mandatory injunction in the District Court for the Southern District of Texas against the enforcement of the award and for the substitution of an award according to the formula he proposed. This formula would have computed the award in either of two ways: (1) 15 per cent of 66⅔ per cent of the claimant's average weekly wage for a period of 212 weeks, or (2) 15 per cent of 212 weeks multiplied by 66⅔ per cent of his average weekly wage. Either of these methods would have amounted to $2,141.20 (R. 10), instead of the $1,113 awarded by the deputy commissioner. The District Court upheld the compensation formula utilized by the deputy commissioner (R. 37) and approved his award (R. 41), and the Court of Appeals for the Fifth Circuit unanimously affirmed (R. 50).

ARGUMENT

The courts below were clearly correct in approving the formula employed by the deputy commissioner for the calculation of compensation due for permanent partial disability. The language and

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amount would have exceeded the statutory maximum of $35 per week, the deputy commissioner made the award rate $35 per week.

purpose of the Act, as well as the long-settled administrative construction, establish beyond cavil that the formula employed is that intended by Congress in its adoption of the Act.

1. Section 8 (c) of the Act provides that in case of permanent partial disability the compensation shall be 66⅔ per cent of the average weekly wage and shall be paid to the employee as follows:

> (3) Hand lost, two hundred and twelve weeks' compensation.
>
> * * * * *
>
> (19) * * * Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

Section 6 (b) provides that "Compensation for disability shall not exceed $35 per week."

As the District Court found (R. 37), the settled administrative interpretation of the Act required that the compensation to which the petitioner was entitled be computed as the deputy commissioner had done: (*a*) Petitioner was entitled to compensation at the rate of 66⅔ per cent of his average weekly wage of $103; but, since this 66⅔ per cent would exceed the $35 per week maximum contained in § 6 (b) of the Act, the basis for computing petitioner's actual rate of compensation was that maximum, $35. (*b*) For a permanent partial disability occasioned by the total loss of his hand, petitioner would have been entitled to compensation at $35 per week for 212 weeks. (*c*) Thus, for a 15 per cent permanent partial dis-

ability of his hand, petitioner should receive compensation for 15 per cent of 212 weeks or 31.8 weeks. (*d*) The final award in the case would then be $1,113.

Petitioner, however, would adopt a different method of calculation. (*a*) He would take 66⅔ per cent of the employee's average weekly wage rate—without regard to the $35 weekly maximum—and then multiply that figure by 15 per cent. (*b*) If the result of that multiplication was not in excess of $35, he would multiply that result by 212 weeks to reach the final compensation award. (*c*) The final result in this case would be $2,141.20.

In mathematical form, the two computations would look like this:

Deputy commissioner:

[66⅔% × weekly wage rate] (but this product cannot be more than $35) × [percentage disability × number of weeks] = actual compensation award.

Petitioner:

[66⅔% × weekly wage rate] (but no maximum as to this product) × [percentage disability × number of weeks] = compensation award (but no more than $35 per week).

The fallacy of petitioner's formula is indicated by Section 8 (c) (19) (Appendix, *infra*, p. 11), the proportionalizing feature of the Act. According to that section, compensation awards for permanent disability to members of the body,

when such loss or loss of use of the member is less than total, are to be proportional to the amounts awarded for total loss or loss of use. But, under petitioner's theory, the actual award would be completely out of proportion to the actual ratio of the loss of use.

Thus, if there had been a 100 per cent disability here—*i. e.*, complete loss of the hand—petitioner's formula would yield $68.67 (66⅔%×$103×100%) for the weekly compensation rate. But this figure is in excess of $35, so that the actual award would have to be based upon the maximum, $35. The award for total disability, loss of use of the hand, would therefore be $35×212, or $7,420. However, for the actual 15 percent disability, petitioner's formula reaches a result of $2,183.60. This means that, although the ratio of the actual disability to the total disability is 15 per cent, the proportion between the awards would be 29 per cent ($2,183.60/$7,420).

Moreover, accentuating the untenability of petitioner's formula is the fact that, for greater percentages of disability, the awards under petititoner's method would not differ from those for total disability. Thus, had there here been a 50 per cent disability of the hand, the total weekly award would be, under petitioner's calculation, $34.33 (66⅔%×$103×50%), or a total of $7,277.96 ($34.33×212). In view of the fact that one who suffers a 100% loss of the use of his hand would receive virtually an identical amount under

petitioner's theory—*i. e.*, $7,420—it becomes quite clear that that interpretation would read the proportionalizing feature of Section 8 (c) (19), the very basis for awards for partial loss of use, right out of the Act.

On the other hand, under the formula of the deputy commissioner, the award for partial disability must always be proportional to an award for total disability to a member of the body. This is necessarily so, because that formula does not distort the $35 weekly maximum figure by diluting 66⅔ per cent of the average weekly wage by the percentage of disability, but rather maintains the $35 maximum as a constant, varying only the duration of compensation.

Accordingly, it is quite clear that the courts below did not err in approving the formula employed by the deputy commissioner to arrive at the petitioner's compensation award.

2. This method of calculation is the one which has been adopted in substantially all the States which, in interpreting workmen's compensation acts with similar structure and language, have passed upon the question.[8] Those courts have held that the number and not the amount of the weekly payments is the variable in computing compensation awards for a permanent disability

[8] Petitioner's contention that this Court approved the formula here advocated by petitioner in *Baltimore and Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408, lacks merit.

which is less than total.[4] Of particular relevance in this regard is the decision of the New York Court of Appeals in *Phonville* v. *New York and Cuba SS. Co.*, 226 N. Y. 622, where, under virtually identical language (Appendix, *infra*, pp. 11–12) and in a similar factual situation, the New York Court stated, in arriving at the same conclusion as did the deputy commissioner and the courts below in the instant case:

> The act fixes but one rate of compensation for injuries. The workman is to receive two-thirds of his weekly wages not exceeding a certain sum. The extent of his injuries limits not the amount of these payments but the time during which they are to continue. If for the loss of a hand that time is 244 weeks, for the loss of three-fourths of the hand, it is 183 weeks. * * *

This Court there stated (pp. 411–412) "The computation employed [by the Commissioner] shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no questions as to that feature of the award, and therefore we need not consider whether it is consonant with the Act." Furthermore, in that case the injured longshoreman's actual average weekly wage was $36.06 and 66⅔ percent thereof was $24.04, or less than the then maximum rate of $25.00 per week fixed by § 6 (b); so that the problem of disproportionate awards occurring if a formula such as that advocated by petitioner were to be utilized was not presented.

[4] *Richardson* v. *Maryland Casualty Co.*, 41 Ga. App. 520, 153 S. E. 524; *Spurgeon* v. *Iowa and Missouri Granite Works*, 196 Iowa 1268, 194 N. W. 286; *Lewis* v. *Allied Contractors, Inc.*, 225 N. W. 770 (Neb., 1929); *Knoxville Power and Light Co.* v. *Barnes*, 156 Tenn. 184, 299 S. W. 772; *Broderick* v. *Industrial Commission*, 224 Pac. 876 (Utah, 1924); *Orlando* v. *F. Ferguson and Son*, 90 N. J. Law 553, 102 A. 155.

> Clearly the compensation for such proportionate loss is intended to be some fraction of the amount allowed for the total loss.

Petitioner's citation of the view of the Texas courts in formulating compensation awards for partial permanent disability as supporting his proposed formula (*Maryland Casualty Co.* v. *Laughlin*, 29 F. 2d 343 (C. A. 5); *Texas Employers' Insurance Association* v. *Holmes*, 196 S. W. 2d 390) is misconceived. There is no provision in the Texas act (Appendix, *infra*, p. 12) comparable to that in the Federal and New York acts that a partial loss of use of a member shall be compensated for in the proportion that the loss bears to the loss of the entire member—see discussion and cases cited in *Texas Employers' Insurance Association* v. *Holmes*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1953.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended by the Act of May 26, 1934, 48 Stat. 806, and by the Act of June 24, 1948, 62 Stat. 602, 33 U. S. C. 901 *et seq.*, provides in pertinent part:

> Section 6 (b), 33 U. S. C., Supp. V, 906 (b):
>
> Compensation for disability shall not exceed $35 per week * * *.
>
> Section 8 (c), 33 U. S. C., Supp. V, 908 (c)
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, * * *
>
> * * * * * *
>
> (3) Hand lost, two hundred and twelve weeks' compensation.
>
> * * * * * *
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

The New York Workmen's Compensation Law, 64 McKinney's Cons. Laws 1 *et seq.*, provides in pertinent part:

> Section 15. Schedule in case of disability.
>
> * * * * * *
>
> 3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to

the employee for the period named in this subdivision, as follows:

Member lost	Number of weeks' compensation
* * *	* * *
c. Hand	244
* * *	* * *

(s) Partial loss or partial loss of use. Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

6. Maximum and minimum compensation for disability. Compensation for permanent or temporary partial disability, or for permanent or temporary total disability due to an accident * * * shall not exceed twenty-eight dollars per week * * *. [At the time of the decision in *Phonville* v. *New York and Cuba SS. Co.*, 226 N. Y. 622, the maximum was twenty dollars per week.]

The Texas Workmen's Compensation Law, Vernon's Revised Civil Statutes of Texas (1953 Supp.) 1925, Article 8306, provides in pertinent part:

Section 12. For the injuries enumerated in the following schedule the employee shall receive in lieu of all other compensation * * * a weekly compensation equal to sixty per cent (60%) of the average weekly wages of such employee * * * nor exceeding Twenty-five dollars ($25) per week, for the respective periods stated herein, to wit: * * *

U. S. GOVERNMENT PRINTING OFFICE: 1955